

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES GINZKEY, RICHARD  
FITZGERALD, CHARLES CERF, BARRY  
DONNER, and on behalf of the class members  
described below,

Plaintiffs,

v.

NATIONAL SECURITIES CORPORATION,  
a Washington Corporation,

Defendant.

Case No.: 2:18-cv-01773-RSM

**DEFENDANT NATIONAL  
SECURITIES CORPORATION'S  
MOTION TO DISMISS**

NOTE ON MOTION CALENDAR:  
MARCH 22, 2019  
WITHOUT ORAL ARGUMENT

**I. INTRODUCTION**

Defendant National Securities Corporation (“Defendant” or “NSC”), by and through its undersigned attorneys hereby moves to dismiss Plaintiffs’ Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). NSC is a registered broker-dealer. Between 2015 and 2017, NSC offered securities of Beamreach Solar (f/k/a Solixel) for sale through private placement memoranda (“PPM”) to accredited investors, such as Plaintiffs, who have a net worth exceeding \$1,000,000 or make at least \$200,000 annually. In the Beamreach PPMs, NSC repeatedly warned that the Beamreach offerings contained a “high degree of risk.”

DEFENDANT’S MOTION TO DISMISS  
Case No.: 2:18-CV-1773

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1 NSC also fully warned Plaintiffs of all of the risks they identify in their Complaint that  
 2 ultimately led to the demise of Beamreach in February 2017. Despite knowing of these very risks,  
 3 Plaintiffs still chose to invest in these securities, likely in hope that they would be high-risk/high  
 4 reward investments. Unfortunately, Beamreach failed and Plaintiffs have now sued NSC for  
 5 negligence and unjust enrichment for offering the Beamreach investments for sale. However, by  
 6 choosing to invest in Beamreach despite NSC's many warnings about the state of the company,  
 7 Plaintiffs assumed the risk that their investment would be lost. Given that the warnings in the  
 8 PPMs are substantively identical to the issues Plaintiffs describe about Beamreach's ultimate  
 9 demise in the Complaint, Plaintiffs' claims are barred by the doctrine of assumption of risk and  
 10 should be dismissed as a matter of law.

## 11 II. STATEMENT OF FACTS

12 NSC is a FINRA member and registered broker-dealer, CRD # 7569. Complaint ¶17.<sup>1</sup> In  
 13 February 2015, Beamreach hired NSC as its placement agent. *Id.* ¶38. NSC made three private  
 14 placement offerings on behalf of Beamreach: (i) the Series D offering of preferred stock beginning  
 15 February 2015 ("Series D Offering"); (ii) the Series D-1 offering of preferred stock in June 2016  
 16 ("Series D-1 Offering"); (iii) and the Series D-2 offering of a 9% convertible promissory note  
 17 offering a 300% "principal step up" in the event of an acquisition in November 2016 (that resulted  
 18 from a conversion of the Series D-1 Offering) ("Series D-2 Offering") (collectively, the  
 19 "Beamreach Offerings"). *Id.* ¶¶38-46. The Beamreach Offerings were only made to "a limited  
 20 group of sophisticated 'accredited investors' within the meaning of Rule 501(a) under the  
 21 Securities Act of 1933 as amended (the 'Securities Act'), in a private placement designed to be  
 22 exempt from registration under the Securities Act, and other applicable securities laws." Exs. A,  
 23 at NSC000001; B at NSC000383; C at NSC000665. Plaintiffs are "accredited investors" if their  
 24 individual net worth, or joint net worth with that person's spouse, exceeds \$1,000,000 or they have  
 25  
 26

27 <sup>1</sup> The facts below taken from the Complaint are accepted as true for the purposes of this motion.

an annual income exceeding \$200,000 in each of the two most recent years or joint income with their spouse during those years in excess of \$300,000. 17 C.F.R. §230.501(a)(5), (6).

The Series D and D-1 Offerings were presented to investors in PPMs. Exs. A, B. The Series D-2 Offering was presented as a supplement to the Series D-1 Offering PPM (collectively, the PPMs and its supplements are identified as the “Beamreach PPMs”). In each Beamreach PPM, NSC made extensive warnings to investors about the high-risk nature of investing in Beamreach. *See* Exs. A, B, and C.<sup>2</sup> In all of the Beamreach Offerings, NSC described the Beamreach investments as having a “high degree of risk.” Ex. A at NSC000022; Ex. B at NSC000384; Ex. C at NSC000676 (emphasis added).

Despite these substantial warnings, Plaintiffs allege that NSC failed to conduct reasonable due diligence on Beamreach before making the three Beamreach Offerings. However, all of the negative facts about Beamreach’s business detailed in Plaintiffs’ Complaint that ultimately led to Beamreach’s demise are described in detail in the Beamreach PPMs.

**1. NSC Disclosed the Risks Described in the Complaint About Beamreach Prior to the Series D Offering.**

NSC conducted the Series D Offering between February 2015 and April 2016. Complaint ¶42. In the Series D Offering PPM, NSC included 23 pages of “Risk Factors,” detailing the state of Beamreach’s business. *See* Ex. A at NSC000022-45. In their Complaint, Plaintiffs detail numerous issues with Beamreach’s business prior to the Series D Offering. All of these issues were described in the Series D Offering PPM. For example, Plaintiffs complain that Beamreach leased all or most of its equipment, leading to an extremely high monthly bill and in the event of bankruptcy, the company owned no equipment it could sell off to pay creditors or investors. Complaint ¶29. But NSC disclosed: “[Beamreach] is party to certain equipment leases that will require regular monthly leasing payments [totaling \$1.1 million per month] for the majority of the

<sup>2</sup> As described below, NSC requests that the Court incorporate by reference and/or take judicial notice of the excerpts of the Beamreach PPMs.

1 Company's tools and manufacturing equipment and reduce the value of distributable assets of the  
2 Company during the terms of such leases." Ex. A at NSC000023.

3 Plaintiffs further complain about the deteriorating marketplace for solar power. Complaint  
4 ¶33. Again, NSC disclosed this risk: "The increase in global supply of solar cells and modules,  
5 and increasing competition, may cause substantial downward pressure on the prices of such  
6 products and cause [Beamreach] to lose sales or market share, resulting in lower revenues,  
7 earnings, and cash flows than are currently projected." Ex. A at NSC000041.

8 Plaintiffs complain about Beamreach's debt to Opus Bank that was secured by substantially  
9 all of Beamreach's assets. Complaint ¶25-26, 83-87. Again, NSC disclosed: "[Beamreach's]  
10 credit agreement with Opus Bank will require [Beamreach] to make regular monthly payments of  
11 interest (beginning in December 2014) and principal (beginning in June 2016), reducing the case  
12 available to finance the Company's operations" specifically identifying that Beamreach had  
13 borrowed \$15 million and intended to draw down an additional \$10 million from Opus Bank. Ex.  
14 A at NSC000024. NSC also disclosed that "[Beamreach's] obligations under the [Opus Bank]  
15 credit agreement are secured by a lien against substantially all of [Beamreach's] obligations." *Id.*

16 Plaintiffs further complain that Beamreach did not have a viable product to sell before  
17 engaging NSC to raise additional funds. Complaint ¶73. Again, NSC disclosed: "[Beamreach] is  
18 a development stage company and has a limited operating history in its current primary business,  
19 making it difficult to evaluate its present and future performance," noting that Beamreach's  
20 "operations to date have consisted largely of product research and development." Ex. A at  
21 NSC000029.

22 Plaintiffs' also complain that as of February 5, 2015, NSC knew that Beamreach only had  
23 a cash runway to continue operations through April 2016 (even with a fully subscribed offering).  
24 Complaint ¶74. Again, NSC disclosed Beamreach's limited cash reserves and noted that  
25 "[Beamreach] cannot be certain that it will obtain sufficient capital investment within the necessary  
26 time frame to continue operations, service its debt obligations, or realize sufficient revenues to  
27

1 achieve or sustain profitability.” Ex. A at NSC000030 ¶4. NSC further disclosed that “If  
2 [Beamreach] is only able to secure an additional \$10 million in the Offering, following the date of  
3 this Memorandum, the Company anticipates that proceeds from the Offering, together with \$5  
4 million in additional venture debt, will only be sufficient to fund its operations through  
5 approximately April 2016 without significant cost reductions.” *Id.* at 22 ¶1.

6 Plaintiffs complain that “NSC also knew that the Beamreach valuation from the Series B  
7 round offered in 2008, had dropped by more than 60% from \$625 million to only \$250 million for  
8 the Series D round. Again, NSC disclosed this fact: “[Beamreach’s] Series B Preferred Stock  
9 financing was completed in 2008 at a valuation of \$625 million. The Company’s Series C  
10 Preferred Stock Financing was completed at a valuation of \$100 million... . While the Series D  
11 Preferred Stock valuation of \$250 million is higher than the Series C Preferred Stock financing, it  
12 is still significantly lower than the Series B Preferred Stock Valuation.” Ex. A at NSC000024.  
13 NSC further noted that this decreased valuation “may suggest that it could be difficult for  
14 [Beamreach] to complete the Offering or raise future rounds.” *Id.*

15 Plaintiffs further complain that Beamreach was only able to secure non-binding  
16 memorandum of understanding with prospective customers. Complaint ¶76. Yet again, NSC  
17 disclosed: “The Company signed Memoranda of Understanding (“MOUs”) with a number of  
18 prospective clients. Most of these non-binding MOUs have expiration dates of December 31,  
19 2014, and the Company is currently in the process of extending them,” noting that Beamreach  
20 “cannot guarantee that it will be able to secure or retain relationships with any of its targeted  
21 customers.” Ex. A at NSC000032 ¶9.

22 Plaintiffs additionally complain that NSC failed to detect that Beamreach’s intellectual  
23 property portfolio was worth only \$300,000 at liquidation. Complaint ¶88-93. But NSC disclosed  
24 two and a half pages detailing the risks related to Beamreach’s technology, specifically noting that  
25 “[Beamreach’s] product development effort is ongoing. While major technical milestones have  
26 been achieved and functional product prototypes demonstrated, several potential technological  
27

hurdles remain, and Solexel’s solar modules have only been tested to a limited extent in outdoor environments.” Ex. A at NSC000035-37.

Plaintiffs complain that by the time NSC was selling to Plaintiffs and the Class, sophisticated private equity funds and venture capitalists had slowed their investment. Complaint ¶80. But Plaintiffs acknowledge that they were warned: “fundraising subsequent to the Series B Preferred Stock round has been difficult for [Beamreach] and may suggest that it could be difficult for [Beamreach] to complete the Offering or raise future rounds. As discussed elsewhere in these Risk Factors, failure to raise additional capital could cause significant harm to [Beamreach’s] operations and financial condition.” Complaint ¶79.

Plaintiffs complain that “NSC knew that Beamreach had no revenue.” Complaint ¶76. However, Plaintiffs also knew that Beamreach had no revenue because NSC stated in the PPM: “[Beamreach] has not yet generated revenue, and, even if [Beamreach] achieves its market launch timing and cost reduction targets, the Company does not expect to generate significant revenue until the fourth quarter of 2016, with small-scale revenue expected to commence in the second half of 2015.” Ex. A at NSC000030 ¶3.

Finally, Beamreach’s financial condition at the time of the Series D Offering, including its debt-load, was well described in detailed financial statements and balance sheets provided in the PPM. Ex. A at NSC000063, NSC000064, NSC000091-116.

Despite these many warnings, Plaintiffs Richard Fitzgerald, Charles Cerf, and Barry Donner chose to invest in the Beamreach Series D Offering. Complaint ¶118-123.

## **2. NSC Disclosed the Risks Described in the Complaint About Beamreach Prior to the Series D-1 Offering.**

As with the Series D offering, all of Plaintiffs’ complaints about Beamreach prior to the Series D-1 Offering of preferred stock were disclosed to investors in the PPM, in 29 pages of “Risk Factors.” The Series D-1 PPM details many of the same risks as the Series D PPM: (1) Beamreach leased most or all of its equipment; (2) there was a deteriorating marketplace for solar technology; (3) substantially all of Beamreach’s assets were secured by the Opus Bank loan; (4) Beamreach is

1 a developing-stage company whose operations have largely consisted of research and  
2 development; (5) Beamreach faces risks related to its technology; and (6) Beamreach's valuation  
3 had dropped from \$625 million to \$250 million. Ex. B at NSC000408 ¶4; NSC000409 ¶5, ¶6;  
4 NSC000415 ¶3; NSC000424-427.

5 In their Complaint, Plaintiffs describe other factors in Beamreach's business that had  
6 deteriorated between the time of the February 2015 Series D Offering and the June 2016 Series D-  
7 1 Offering. For example, Plaintiffs complain that by June 2016, Beamreach still had not entered  
8 into a contract with a manufacturer for its product. Complaint ¶34. Again, NSC disclosed this  
9 fact in the Series D-1 PPM: "If the Company cannot successfully implement the Neo Solar Power  
10 MSA or cannot finalize agreements with a Contract Manufacturer or other third-party  
11 manufacturer, this would significantly increase the risk of delays in Beamreach Solar's  
12 manufacturing scale-up." Ex. B at NSC000428 ¶2.

13 Plaintiffs similarly complain about Beamreach's burn rate and losses in 2015 and the first  
14 half of 2016. *See* Complaint ¶35. However, Beamreach's financial condition at the time of the  
15 Series D-1 Offering was well described in detailed financial statements and balance sheets  
16 provided in the PPM. Ex. B at NSC000450-451, NSC000505, NSC000477-503.

17 As with the Series D Offering, Plaintiffs complain that Beamreach only had memoranda of  
18 understanding with customers. But again, NSC detailed Beamreach's MOUs in the PPM: "[I]n  
19 June 2016, Beamreach Solar had entered into non-binding MOU's with some of the PV industry's  
20 leading distributors and developers with a combined volume of approximately 110 MW.  
21 Beamreach Solar is currently in the process of converting these MOUs into master supply  
22 agreements." Ex. B at NSC000464.

23 Despite these many warnings, Plaintiff Barry Donner chose to invest in the Series D-1  
24 Offering. Complaint ¶118-123.



1       **3. NSC Disclosed the Risks Described in the Complaint About Beamreach Prior to the**  
 2       **Series D-2 Offering.**

3       NSC raised \$8 million of the \$10 million minimum to release the investor cash raised in  
 4       the Series D-1 Offering from escrow so NSC changed the Series D-1 Offering from preferred stock  
 5       to a convertible secured promissory note for the Series D-2 Offering. Complaint ¶45. The terms  
 6       for these notes were 9% with a six-month term, and featured a 300% premium on principal to be  
 7       paid after months, or if the company was sold, whichever occurred first. Complaint ¶45. On  
 8       November 14, 2016, NSC issued a Supplement to its Series D-1 Offering PPM detailing the change  
 9       in the investment. Ex. C. The revised offering was made because of “delays in completion of the  
 10      initial closing of the [Series D-1] Offering, reduced cash runway, developments at the Company,  
 11      developments in the solar market and discussions with prospective participants in the Offering.”  
 12      *Id.* at NSC000664. The Series D-2 PPM Supplement detailed that the Company’s primary plan  
 13      was the sale of the Company. *Id.*

14      As with the prior two offerings, NSC disclosed many of the deteriorating problems at  
 15      Beamreach in over five pages of new Risk Factors, supplementing the Risk Factors disclosed in  
 16      the Series D-1 PPM. For example, Plaintiffs complain that Beamreach’s October 2016 Fifth  
 17      Amendment to the Opus Bank financing essentially placed a terminal date on Beamreach, whereby  
 18      Beamreach was required to replace or refinance its \$24.2 million loan within six months of the  
 19      Fifth Amendment. NSC, however, was transparent with investors about the Fifth Amendment,  
 20      even attaching a copy of it with the Supplemental PPM. Ex. C. NSC also disclosed: “Under the  
 21      terms of the current agreement with Opus Bank, as amended by the Opus [Fifth] Amendment, the  
 22      Company will effectively be required to replace the outstanding Opus bank debt facility, raise  
 23      significant additional equity or sell the Company on or before March 31, 2017. If the Company is  
 24      unable to find a new lender, raise such equity or complete a sale, it may have to shut down.” Ex.  
 25      C at NSC000678 (emphasis added).

26      Plaintiffs allege that Beamreach retained bankruptcy counsel prior to the Series D-2  
 27      Offering. Complaint ¶101. However, it is clear from the PPM supplement that Beamreach was a



1 financially-distressed company and that a wind-down was a possibility at the time of the Series D-  
 2 2 Offering. NSC described that “If the Company does not meet the additional funding deadlines  
 3 imposed by Opus Bank, the Company will be in default of the Credit Agreement with Opus Bank,  
 4 all capital previously invested in the Offering will be at risk and the Company may be forced to  
 5 pursue an immediately [sic] sale or wind down.” Ex. C at NSC000678 ¶4.

6 Despite these many warnings, Plaintiffs James Ginzkey and Richard Fitzgerald invested in  
 7 the Series D-2 Offering. Complaint ¶118-123.

#### 8 **4. Beamreach filed for Bankruptcy and Plaintiffs Filed this Suit against NSC.**

9 On February 9, 2017, Beamreach filed for Chapter 7 bankruptcy. Complaint ¶47.  
 10 Plaintiffs then filed suit on December 10, 2018, on behalf of themselves and a putative class.  
 11 Plaintiffs seek to represent a class of all persons who invested in the Beamreach Offering through  
 12 NSC between February 6, 2015 and February 9, 2017, as well as Series D, Series D-1, and Series  
 13 D-2 Sub-Classes. *Id.* ¶124. Jurisdiction is based on the Class Action Fairness Act. Complaint ¶8.

14 Relying on FINRA rules to form part of the basis of NSC’s duties, Plaintiffs claim that  
 15 NSC was negligent by (1) not conducting adequate due diligence on Beamreach; and (2) failing to  
 16 understand the risks and rewards of the Beamreach offerings or consciously ignoring the risks  
 17 presented by those red flags. Complaint p. 29-34. Plaintiffs also have made a claim for unjust  
 18 enrichment. *Id.* p. 35. For the following reasons, Plaintiffs fail to state a claim and their Complaint  
 19 must be dismissed with prejudice.

#### 20 **IV. ARGUMENT**

21 To survive a Rule 12(b)(6) motion to dismiss, a “plaintiff must allege enough facts to state  
 22 a claim to relief that is plausible on its face.” *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588  
 23 (9th Cir.2008) (internal quotation marks omitted). In assessing whether a party has stated a claim  
 24 upon which relief can be granted, a court must take all allegations of material fact as true and  
 25 construe them in the light most favorable to the nonmoving party, but “conclusory allegations of  
 26 law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v.*  
 27

1 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir.2009) (internal quotation marks omitted). A complaint’s  
 2 “basic deficiency . . . should be exposed at the point of minimum expenditure of time and money  
 3 by the parties and the court.” *Id.* at 558 (citations omitted).

#### 4 **1. The PPMs are Incorporated by Reference.**

5 Under the incorporation by reference doctrine, the court may consider documents “whose  
 6 contents are alleged in a complaint and whose authenticity no party questions, but which are not  
 7 physically attached to the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),  
 8 *overruled on other grounds by* 307 F.3d 1119, 1121 (9th Cir. 2002). Beamreach PPMs are  
 9 incorporated into the complaint. Plaintiffs’ Complaint expressly states the Complaint is “based on  
 10 the investigation conducted by and through Plaintiffs’ attorneys, which included, among other  
 11 things: a review of the offering materials presented to Plaintiffs by Defendant, National Securities  
 12 Corporation (“Defendant” or “NSC”) regarding private placement securities offerings made by  
 13 Beamreach Solar, Inc. (“Beamreach”)... .” Complaint ¶1 (emphasis added). Further, Plaintiffs  
 14 specifically quoted the Series D PPM in the Complaint. *Compare* Complaint ¶79 with Ex. A at  
 15 NSC000024 ¶6. Thus, because the PPMs and their supplements are described and even quoted  
 16 from in the Complaint, they should be incorporated by reference for this motion. *See Ciuffitelli v.*  
 17 *Deloitte & Touche LLP*, No. 3:16-CV-00580-AC, 2018 WL 4568737, at \*3 (D. Or. Aug. 1, 2018),  
 18 *report and recommendation adopted*, No. 3:16-CV-00580-AC, 2018 WL 4568586 (D. Or. Sept.  
 19 21, 2018) (incorporating private placement memorandum by reference on defendant’s motion to  
 20 dismiss securities complaint); *Collins v. Winex Investments, LLC*, No. CIV. 08CV51-L (CAB),  
 21 2009 WL 861738, at \*5 (S.D. Cal. Mar. 27, 2009) (same). Unlike judicial notice, a court may  
 22 assume an incorporated document’s contents are true for purposes of a motion to dismiss under  
 23 Rule 12(b)(6). *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

24 Alternatively, the Court should take judicial notice of the Beamreach PPMs because they  
 25 are not subject to reasonable dispute (including by the Plaintiffs who rely on them) and their  
 26 accuracy cannot reasonably be questioned. Federal Rule of Evidence 201 allows a court to take  
 27

1 judicial notice of facts “not subject to reasonable dispute” because they can be accurately and  
 2 readily determined from sources whose accuracy cannot reasonably be questioned. *See Seaman*  
 3 *v. Sedgwick LLP*, No. SACV110664DOCRNBX, 2013 WL 12204741, at \*7 (C.D. Cal. July 8,  
 4 2013) (taking judicial notice of private placement memoranda on defendant’s motion to dismiss);  
 5 *Kenney v. Deloitte, Haskins & Sells*, No. C 91-0590 BAC, 1992 WL 551108, at \*2 (N.D. Cal.  
 6 Sept. 2, 1992) (same); *Anschutz Corp. v. Merrill Lynch & Co. Inc.*, 785 F. Supp. 2d 799, 812 (N.D.  
 7 Cal. 2011) (same).

8 This is not a case of Defendant “pil[ing] on exhibits to their motion to dismiss,” as was  
 9 criticized in *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1005 (9th Cir. 2018). To the  
 10 contrary, NSC relies on three documents that were critical to this transaction and expressly relied  
 11 on by Plaintiffs’ counsel when preparing the Complaint.

12 **2. The Court Should Dismiss the Complaint Based on NSC’s Affirmative Defense of**  
 13 **Assumption of Risk.**

14 A motion to dismiss under Rule 12(b)(6) can be granted based upon an affirmative defense  
 15 when that “defense raises no disputed issues of fact.” *Scott v. Kuhlmann*, 746 F.2d 1377, 1378  
 16 (9th Cir. 1984). Specifically, a motion to dismiss may be granted where the allegations in a  
 17 complaint are contradicted by matters incorporated by reference or properly subject to judicial  
 18 notice. *Casault v. Fed. Nat. Mortg. Ass’n*, 915 F. Supp. 2d 1113, 1120 (C.D. Cal. 2012), *aff’d sub*  
 19 *nom. Casault v. One W. Bank FSB*, 658 F. App’x 872 (9th Cir. 2016) (citing *Daniels-Hall v. Nat’l*  
 20 *educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010)); *Sprewell v. Golden State Warriors*, 266 F.3d 979,  
 21 988 (9th Cir.), opinion amended on denial of reh’g, 275 F.3d 1187 (9th Cir. 2001) (“The court need  
 22 not ... accept as true allegations that contradict matters properly subject to judicial notice or by  
 23 exhibit.”). Further, a motion to dismiss may be granted based upon an affirmative defense where  
 24 the complaint’s allegations, with all inferences drawn in plaintiff’s favor, nonetheless show that  
 25 the affirmative defense is “apparent on the face of the complaint.” *Id.* (quoting *Von Saher v.*  
 26 *Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010). Here, for reasons  
 27 described below, NSC’s affirmative defense of assumption of risk is apparent on the face of

1 Plaintiffs' Complaint, when reviewing the PPMs and supplements that disclose the very risks  
 2 Plaintiffs identify in the Complaint – risks that Plaintiffs chose to assume when purchasing the  
 3 Beamreach investments.

4 **3. Because of NSC's Many Warnings, Plaintiffs Assumed the Risk that their**  
 5 **Investments Might be Lost.**

6 Under Washington law,<sup>3</sup> assumption of risk, implied primary assumption of risk is a  
 7 complete bar to recovery. *Gleason v. Cohen*, 192 Wn. App. 788, 793, 368 P.3d 531, 534 (2016).  
 8 “Implied primary assumption of risks arises when (1) the plaintiff impliedly consents to relieve  
 9 the defendant of a duty to plaintiff about specific known and appreciated risks; and (2) the plaintiff  
 10 engages in conduct, from which consent is implied.” *Wirtz v. Gillogly*, 152 Wn. App. 1, 8, 216  
 11 P.3d 416, 420, *published with modifications at* 150 Wash. App. 1053 (2009) (quoting *Scott v. Pac.*  
 12 *W. Mountain Resort*, 119 Wn.2d 484, 497, 834 P.2d 6 (1992) and *Erie v. White*, 92 Wn. App. 297,  
 13 303, 966 P.2d 342 (1998)) (internal citations omitted). Knowledge and voluntariness may be  
 14 decided as a matter of law when reasonable minds could not differ. *Id.* Here, when reviewing the  
 15 PPMs, reasonable minds cannot differ that specific information was disclosed to the Plaintiffs  
 16 giving them actual and constructive knowledge of all known risks of investing in Beamreach.  
 17 Despite having full knowledge of these risks, Plaintiffs still chose to purchase the Beamreach  
 18 investments. By doing so, Plaintiffs assumed the risk that they would lose their investments.

19 Notably, Plaintiffs have not alleged that NSC misled them in anyway, made any  
 20 misrepresentations about the Beamreach investments, or committed any fraud. Rather, Plaintiffs  
 21 have alleged negligence and unjust enrichment.

22 “[W]hen an investor has been warned of risks of a significance similar to that actually  
 23 realized, [he] is sufficiently on notice of the danger of the investment to make an intelligent  
 24 decision about it according to [his] own preferences for risk and reward.” *Harris v. Ivax Corp.*,

25 <sup>3</sup> In a diversity action, the court must apply the forum state's choice of law rules to determine the controlling  
 26 substantive law. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 950 (9th Cir. 2005). “In Washington, the ‘presumptive  
 27 local law’ applies unless there is ‘an actual conflict between the laws or interests of Washington and the laws or  
 interests of another state.’” *Brewer v. Dodson Aviation*, 447 F.Supp.2d 1166, 1175 (W.D. Wash. 2006).

182 F.3d 799, 807 (11th Cir. 1999)<sup>4</sup>; *accord Kronk v. Landwin Grp., LLC*, No. SACV1000344CJCMLGX, 2011 WL 13143096, at \*4 (C.D. Cal. June 7, 2011), aff'd, 517 F. App'x 605 (9th Cir. 2013) (dismissing complaint against fund managers for securities fraud and negligence in substantial part where a private placement memoranda described a fund as a “high-risk investment” and specifically described many of the risks related to the fund); *Elliot v. Drugstore.com*, No. C04-1474RSM, at 8 (W.D. Wash. Oct. 19, 2005) (Attached as Exhibit D) (dismissing complaint for securities fraud where Drugstore.com “warned investors of important factors that could cause the company’s business to deviate from its forecasts.”). In the three PPMs at issue, NSC expressly warned Plaintiffs and the other investors of Beamreach’s issues that are identified in the Complaint, as follows:

- The Beamreach investments had a “high degree of risk”;
- Beamreach was party to equipment leases that required \$1.1 million monthly payments and reduced the value of distributable assets;
- The solar market had become oversaturated in supply, causing downward pressure on prices;
- Beamreach owed up to \$25 million in debt to Opus Bank that was secured by substantially all of Beamreach’s assets;
- Beamreach was a development-stage company with a limited operating history;
- Beamreach had never had revenue;
- Beamreach’s operations had consisted largely of product research and development;
- Beamreach could not be certain to raise enough money to continue operations;
- Beamreach’s valuation had dropped from \$625 million to \$250 million between 2008 and 2015;
- Beamreach had memoranda of understanding with potential customers;

<sup>4</sup> Although the *Harris* case was decided on the basis of the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995, the principle is equally applicable to the assumption of risk doctrine in a negligence action because it shows that the investor was on notice of the dangers of the investment and voluntarily assumed the risk of the investment.

- 1 • Beamreach had risks related to its technology;
- 2 • Beamreach had not finalized agreements with a third-party manufacturer;
- 3 • Beamreach had a high burn rate;
- 4 • The Fifth Amendment to the agreement with Opus Bank would require Beamreach to raise
- 5 significant additional equity or sell the company on or before March 31, 2017; and
- 6 • Beamreach may be forced to pursue an immediate sale or wind down.

7 See Exs. A, B, C. This is just a sampling of the warnings contained in the PPMs. Plaintiffs cannot  
8 argue that they did not actually read the warnings in the Beamreach PPMs. “[I]nvestors are  
9 presumed to have read prospectuses, quarterly reports, and other information related to their  
10 investments.” *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 252 (3d Cir.2001).

11 Further, the Beamreach investments were not offered to just anyone. Rather, the  
12 Beamreach investments were only offered to a limited group of sophisticated “accredited  
13 investors.” Accredited investors are “considered sophisticated enough by virtue of their assets and  
14 experience that they don’t need so much protection [as unsophisticated investors].” *ACAP Fin.,*  
15 *Inc. v. U.S. S.E.C.*, 783 F.3d 763, 765 (10th Cir. 2015). Therefore, there are relaxed rules for  
16 selling investments to accredited investors and such securities are not required to be registered  
17 with the Securities and Exchange Commission. *Id.* Accredited investors also are presumed to be  
18 sophisticated and aware of the risks involved in their investments. See *Davis v. St. Anselm Expl.*  
19 *Co.*, No. 10-CV-883 KG/WPL, 2015 WL 13651012, at \*5 (D.N.M. Oct. 8, 2015). Accordingly,  
20 Plaintiffs were sophisticated investors capable of understanding the many risks of the Beamreach  
21 investments and make competent decisions based on their risks tolerance.

22 Plaintiffs did not receive boiler-plate warnings. These were detailed warnings that  
23 specifically identify the problems that Plaintiffs allege in the Complaint ultimately caused the  
24 demise of Beamreach. With full knowledge of the challenges facing Beamreach, Plaintiffs chose  
25 to invest in Beamreach. In other words, Plaintiffs chose to assume the risk, in return for a  
26 potentially high reward. Therefore, Plaintiffs’ claims are barred.

**V. CONCLUSION**

Defendant National Securities Corporation respectfully requests that the Court dismiss Plaintiffs' claims with prejudice.

DATED this 28<sup>th</sup> day of February, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 28, 2019, I electronically filed the foregoing DEFENDANT NATIONAL SECURITIES CORPORATION'S MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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